No. 14-1457

In the Supreme Court of the United States

BRANDON THOMAS BETTERMAN,
Petitioner,

v.

STATE OF MONTANA,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Montana

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a defendant convicted of a crime must show actual prejudice when asserting a challenge based on unjustified sentencing delay.

2. Whether the Montana Supreme Court correctly held that the Due Process Clause of the Fourteenth Amendment, rather than the Speedy Trial Clause of the Sixth Amendment, governs claims of unjustified delay in conducting sentencing proceedings.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

BRIEF IN OPPOSITION 1

STATEMENT OF THE CASE 3

REASONS FOR DENYING THE PETITION 9

I. The Primary Issue That Betterman Raises Is Whether a Defendant Must Show Actual Prejudice When Raising an Unjustified Sentencing Delay Challenge, Which Has Not Divided Lower Courts 9

II. There Is Not a Genuine Conflict on Whether the Speedy Trial Clause Applies to Sentencing Because Courts Have Merely Relied on the Court's Assumption in *Pollard v. United States* 13

III. The Montana Supreme Court Was Correct That the Due Process Clause Is a Better Fit for the Right to Timely Sentencing 17

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES

Apprendi v. New Jersey,
530 U.S. 466 (2000) 5, 18

Ball v. Whyte,
294 S.E.2d 270 (W. Va. 1982) 16

Barker v. Wingo,
407 U.S. 514 (1972) ..... *passim*

Blakely v. Washington,
542 U.S. 296 (2004) 5

Bodnari v. State,
839 A.2d 665 (Del. 2003) 11

In re Bonner,
151 U.S. 242 (1894) 18

Bozza v. United States,
330 U.S. 160 (1947) 6, 7, 17, 18

Burkett v. Cunningham,
826 F.2d 1208 (3d Cir. 1987) 11, 14

Commonwealth v. Pounds,
417 A.2d 597 (Pa. 1980) 15

Dickey v. Florida,
398 U.S. 30 (1970) 13

Doggett v. United States,
505 U.S. 647 (1992) 19

Gonzales v. State,
582 P.2d 630 (Alaska 1978) 15

Hoang v. People,
323 P.3d 780 (Colo. 2014) 11

Jolly v. State,
189 S.W.3d 40 (Ark. 2004) 15

Juarez-Casares v. United States,
496 F.2d 190 (5th Cir. 1974) 14

McMillan v. Pennsylvania,
477 U.S. 79 (1986) 19

Moore v. Arizona,
414 U.S. 25 (1973) 10

Nichols v. United States,
511 U.S. 738 (1994) 19

Noe v. State,
391 So. 2d 151 (Ala. 1980) 14, 15

Perdue v. Commonwealth,
82 S.W.3d 909 (Ky. 2002) 11, 15

Perez v. Sullivan,
793 F.2d 249 (10th Cir. 1986) 10

Pollard v. United States,
352 U.S. 354 (1957) ..... *passim*

State ex rel. McLellan v. Cavanaugh,
498 A.2d 735 (NH 1985) 14

State v. Banks,
720 P.2d 1380 (Utah 1986) 15

State v. Dean,
536 A.2d 909 (Vt. 1987) 15

State v. Drake,
259 N.W.2d 862 (Iowa 1977) 15

State v. Johnson,
363 So. 2d 458 (La. 1978) 16

State v. Kaster,
469 N.W.2d 671 (Iowa 1991) 16

State v. Mooney,
137 P.3d 532 (Mont. 2006) 7, 16

Strunk v. United States,
412 U.S. 434 (1973) 6, 17, 18

Trotter v. State,
554 So. 2d 313 (Miss. 1989) 15

United States v. Campbell,
531 F.2d 1333 (5th Cir. 1976) 11

United States v. Danner,
429 Fed. App'x. 915 (11th Cir. 2011) 12, 14

United States v. Lovasco,
431 U.S. 783 (1977) 9, 19, 20

United States v. Nelson-Rodriguez,
319 F.3d 12 (1st Cir. 2003) 11

United States v. Ray,
578 F.3d 184 (2d Cir. 2009) 12, 13, 14, 15, 18

United States v. Reese,
568 F.2d 1246 (6th Cir. 1977) 14

United States v. Westmoreland,
712 F.3d 1066 (7th Cir. 2013) 11

United States v. Yehling,
456 F.3d 1236 (10th Cir. 2006) 10, 11, 14

CONSTITUTIONS AND STATUTES

U.S. Const. amend. VI ..... *passim*

U.S. Const. amend. XIV ..... *passim*

Mont. Const. Art. II, § 17 7

Mont. Const. Art. II, § 24 5

Mont. Code Ann. § 46-18-101(3)(a) 7, 16

Mont. Code Ann. § 46-18-102(3)(a) 7, 16

Mont. Code Ann. § 46-18-115 ..... 8, 16, 17

Other Authority

4 W. Blackstone, *Commentaries on the Laws of England* (1769) 18

BRIEF IN OPPOSITION

Petitioner Brandon Betterman (Betterman) asks this Court to correct what he claims is the Montana Supreme Court's error in determining that the Due Process Clause rather than the Sixth Amendment's Speedy Trial Clause applies to unjustified sentencing delay.

But Betterman frames the issue too broadly. What he is really asking this Court to resolve is whether a defendant must show prejudice under this Court's Speedy Trial test from *Barker v. Wingo* in cases challenging unjustified sentencing delay. *See* Pet. at 21 (arguing that the outcome of his case may be different if the Speedy Trial Clause applies and he is not required to show actual prejudice). And on that question, there is no conflict among lower courts that requires this Court's resolution. Courts consistently require a showing of prejudice—whether under Due Process or the Sixth Amendment—when the claim involves post-trial delays, including sentencing delays.

Thus, this is not an important issue that needs this Court's resolution, but rather an academic exercise over whether the right to timely sentencing is better grounded in the Due Process Clause or the Speedy Trial Clause. The practical difference is nil because courts review sentencing delays under both clauses in a substantially similar manner.

Regardless, Betterman overstates the conflict on whether the Sixth Amendment Speedy Trial right should apply to sentencing because very few courts have actually given the issue reasoned consideration. Rather, every court that has applied the Sixth

Amendment to sentencing delays has based its decision on *Pollard v. United States*, 352 U.S. 354 (1957), which merely assumed the right *arguendo* before denying the claim on the merits. Conversely, every court to give substantive consideration to whether the Speedy Trial right applies to sentencing delays has held that it does not. In short, there is no split of authority that warrants this Court's attention because only a handful of courts have actually analyzed the issue, and they agree that the Sixth Amendment right to a speedy trial does not apply to post-trial delays. Thus, the prudent course is to wait to see how the issue settles once lower courts have considered the issue in depth.

And there is good reason to believe that when courts actually analyze the issue they will, like the Montana Supreme Court, find that the Due Process Clause rather than the Sixth Amendment Speedy Trial Clause is a much better fit for protecting the right to timely sentencing. To hold that the Sixth Amendment applies in such situations is inconsistent with the plain language and history of the amendment, potentially puts this Court's precedents in conflict, and creates problems for whether the remedy can be something other than dismissal of the criminal charges. The Due Process Clause, on the other hand, follows a substantively similar analysis and is a more natural fit.

In sum, this case presents no important issue dividing lower courts that needs this Court's resolution.

STATEMENT OF THE CASE

Betterman appealed to the Montana Supreme Court from his judgment of conviction and sentence for committing felony bail jumping when he admittedly failed to appear for sentencing on charges of felony partner or family member assault ("PFMA"). Judgment, Dkt. No. 33.[1] Betterman pled guilty to bail jumping, as charged and admitted, at his first opportunity at the arraignment on April 19, 2012. *See* Minute Entry, Dkt. No. 6; Guilty Plea and Waiver of Rights, Dkt. No. 7 Betterman objected to the State's intended designation of him as a persistent felony offender ("PFO"). Minute Entry, Dkt. No. 6. In fact, as the State contended and the defense admitted, the reason for the swift guilty plea was twofold: Betterman wanted to avoid PFO designation by entering his plea before the State filed its PFO notice; and also because "in fact, he was guilty. He didn't have a defense." 6/27/13 Tr. at 19-20, 23.

Following his guilty plea, Betterman moved to strike the PFO notice, which took seven months to brief and for the district court to decide. *See* Motion to Strike and Briefs, Dkt. Nos. 8-9, 15; Minute Entry, Dkt. No. 17; Order, Dkt. No. 18. While the motion to strike was pending, the State ordered and produced the presentence investigation report ("PSI"), and the

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[1] All "Dkt. No." references are to the district court file in *State of Montana v. Betterman*, Second Judicial District Court, Butte/Silver Bow County, Cause No. DC-12-45, made a part of the record on appeal before the Montana Supreme Court, Cause No. DA 13-0572. The State will reference transcripts of hearings in that same cause number and appeal by date and page number.

district court scheduled sentencing for January 17, 2013. Dkt. Nos. 10-11, 20-21. Rather than proceed with sentencing as scheduled, Betterman filed a motion to dismiss the charges based on a "speedy trial" violation. Motion to Dismiss, Dkt. No. 22; 1/17/13 Tr. at 3. Briefing and denial of that motion, as well as Betterman's motion to reconsider and supplement to the motion to dismiss, further delayed his sentencing until June 27, 2013, approximately fourteen months after he pled guilty. *See* Dkt. Nos. 24-31.

At sentencing, rather than testifying to any "prejudice" or "anxiety" from serving his PFMA sentence in jail while he was awaiting sentencing for bail jumping, Betterman testified that "coming to jail saved my life. I'll admit that." 6/27/13 Tr. at 18. Betterman testified:

> On March 15th last year, [the district court] told me that I have to take it seriously. That's something I've thought about extensively. And he was absolutely right. I have in [these] past 500 days. I would like to say I've changed. I would like to say that everything in my whole life has changed for the better. Right now, I can say that from right here.

Id. at 17-18. Betterman said his jail time had kept him from "the temptations of the street." *Id.* at 18. He believed now he could succeed and finally have a chance with his son. *Id.* He testified, "I want to make the better and the best of myself [so] that I can finally make something for my son." *Id.* at 19. Betterman felt "for the first time I can actually be honest with myself and feel that I can do something with myself and have a legitimate plan that's actually achievable,

which is going back to school to get a marketing degree and further my education." *Id.* at 18. Betterman felt that he had matured, and he gave his word he would not repeat his past behavior, emphasizing that "this jail that I have been in, I've been no trouble." *Id.* at 18-19.

The Montana Supreme Court affirmed Betterman's judgment of conviction and sentence, upholding the district court's denial of his motion to dismiss for undue delay in sentencing. Pet. App. 1a-23a. Betterman asserted on appeal that his right to a speedy trial, deriving from the Sixth Amendment of the United States Constitution and article II, section 24, of the Montana Constitution, included the period from the date of his guilty plea until the date of his sentencing. *Id.* at 5a.

The Montana Supreme Court held that the constitutional right to a speedy trial ceases to apply when a criminal conviction becomes definitive and does not extend after conviction to sentencing. Pet. App. 14a-15a, 23a. The court observed the distinctions between trial and sentencing, noting the principles identified by this Court in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004), "separating the trial establishing guilt from the imposition of penalty." *Id.* at 8a-9a. These distinctions are mirrored in Montana's statutory scheme, which separates the trial phase of a criminal prosecution from the penalty or sentencing phase, and are embodied in definitions of the terms "trial" and "sentence." *Id.* at 10a. Further, the text of the state and federal constitutional provisions expressly identify

the protections due in the context of a "*trial*." *Id.* (emphasis in original).

The Montana Supreme Court also distinguished the interests that the constitutional speedy trial right was designed to protect as manifestly different from the interests of a convicted defendant in being sentenced without delay. Pet. App. 11a-13a. The latter concerns, the court found, "are compelling, but nevertheless ill-suited for remediation through the constitutional right to speedy trial." *Id.* at 13a. Though a criminal prosecution encompasses sentencing and the prosecution does not terminate until sentence is imposed, this proposition has no bearing on when a trial terminates. *Id.* "'Trial' is not synonymous with 'prosecution.'" *Id.*

Finally, on the question of whether the constitutional right to speedy trial extends to sentencing, the Montana Supreme Court addressed the proper remedy for delay that occurs after conviction. Pet. App. 14a. The court noted that the only remedy for a speedy trial violation is dismissal of the charges, *Strunk v. United States*, 412 U.S. 434, 440 (1973), which contrasts with the remedy for a sentencing error. *Id.* For the latter, this Court has rejected the notion that a defendant whose guilt has been established may "escape punishment altogether, because the court committed an error in passing sentence." *Id.* (citing *Bozza v. United States*, 330 U.S. 160, 166-67 (1947)). The Montana Supreme Court concluded, "[i]f the constitutional speedy trial right extends through sentencing, then these two remedial doctrines conflict. To construe them consistently, we must find that the constitutional speedy trial right does not include

sentencing and that therefore a delay in sentencing does not warrant dismissal of the charges." *Id.* Hence, in this case, the right to a speedy trial ceased upon entry of Betterman's guilty plea.

Having arrived at this conclusion, the Montana Supreme Court overruled its previous decision in *State v. Mooney*, 137 P.3d 532 (Mont. 2006), which had summarily determined that sentencing was part of trial for purposes of the Sixth Amendment. Pet. App. 7a-8a, 15a. The court chose to reexamine *Mooney* and the nature of sentencing delay claims, because—as other courts around the country had done—the *Mooney* court had arrived at its holding without analysis or explanation and in apparent reliance on the assumption that this Court made in *Pollard v. United States*, 352 U.S. 354, 361 (1957) ("[assuming] *arguendo* that sentence is part of the trial for purposes of the Sixth Amendment"). *Id.* at 7a-8a.

Having found that the Sixth Amendment right to speedy trial was inapplicable, the Montana Supreme Court held that a criminal defendant has a constitutional due process right to have sentence imposed in a timely manner, without unreasonable delay, as embodied in the Due Process Clause of the Fourteenth Amendment to the United States Constitution and article II, section 17, of the Montana Constitution. Pet. App. 15a-20a, 23a. Reasonable timeliness of sentencing is a due process guarantee expressed by the Montana Legislature in several statutory provisions. *Id.* at 16a-17a (citing Mont. Code Ann. §§ 46-18-101(3)(a) ("Sentencing and punishment must be certain, timely, consistent, and understandable."); 46-18-102(3)(a) ("if the verdict or

finding is guilty, sentence must be pronounced and judgment rendered within a reasonable time"); 46-18-115 ("the court shall conduct a sentencing hearing without unreasonable delay").) The court found that these prohibitions, taken together with the protection against unfair treatment in criminal proceedings guaranteed by the Due Process Clause, protect a criminal defendant from unreasonable delay between conviction and sentencing. *Id.* Betterman, however, failed to raise a statutory claim under these code provisions mandating that a defendant be sentenced in a "timely" manner, without "unreasonable delay." *Id.* at 7a, 17a, 22a-23a.

Applying these protections, the Montana Supreme Court recognized that whether there has been unreasonable sentencing delay in violation of due process depends upon the circumstances of each case, and requires consideration of two related factors: 1) the reasons for delay and 2) the prejudice to the defendant. Pet. App. 17a-18a. As this Court declared in *Pollard*, the "delay must not be purposeful or oppressive." *Id.* at 18a (citing *Pollard*, 352 U.S. at 361.) The court discussed the treatment of different reasons for delay, ranging from diligent prosecution to negligence to delay caused by bad faith. *Id.* at 18a-19a. The determination of whether a delay is oppressive, then, incorporates considerations of whether the defendant has suffered prejudice and the degree and nature of that prejudice. *Id.* at 19a. Ultimately, neither factor should be considered dispositive—though the reasons for a delay may be less than purposeful, or the prejudice caused by the delay less than oppressive, there may still be a constitutional violation when these two considerations are balanced against one another. *Id.* at 19a-20a.

The Montana Supreme Court analyzed Betterman's claim of unreasonable sentencing delay under the above due process considerations. Pet. App. 20a-22a. The court found that the 14-month delay in Betterman's sentencing was unacceptable—while not purposeful, the court found no legitimate reason for such a delay in this case. *Id.* at 20a, 23a. However, the court found that Betterman's prejudice from the delay was speculative, and not substantial and demonstrable as required to establish a due process violation. *Id.* at 21a-23a. On balance, the delay, though unacceptable, did not warrant finding a constitutional due process violation. *Id.* at 22a.

REASONS FOR DENYING THE PETITION

I. The Primary Issue That Betterman Raises Is Whether a Defendant Must Show Actual Prejudice When Raising an Unjustified Sentencing Delay Challenge, Which Has Not Divided Lower Courts.

Betterman frames the issue as whether the Speedy Trial Clause of the Sixth Amendment or Due Process Clause applies to unreasonable sentencing delays. He argues that resolution of that issue "will determine the outcome of this case." Pet. at 21. Betterman asserts this is so because if the Sixth Amendment applies with its "more defendant-friendly *Barker* test," Pet. at 19, he will not be "saddled with the unjustified burden of proving actual prejudice." Pet. at 17 In short, he claims that while the Due Process Clause always requires a showing of prejudice, *see United States v. Lovasco*, 431 U.S. 783, 790 (1977), the test for a Speedy Trial Clause violation does not. Pet. at 17 In speedy trial challenges, courts balance the four factors from

Barker v. Wingo—the length of delay, reason for the delay, the defendant's assertion of the right, and whether the defendant has been prejudiced—with no one factor controlling. 407 U.S. 514, 521 (1972). There is no dispute that, in the context of *trial* delay, a defendant does not necessarily need to show prejudice if he can make a compelling case for the other factors. *Moore v. Arizona*, 414 U.S. 25, 26 (1973).

But Betterman is not challenging *trial* delay; he is challenging *sentencing* delay And, although this Court has not addressed the issue, the First, Third, Seventh, and Tenth Circuits, as well as several state high courts, have required a showing of actual prejudice in cases involving post-trial delay under the Sixth Amendment. Betterman has not identified (and the State has been unable to locate) any case holding otherwise.

The Tenth Circuit was the first to directly confront whether the *Barker v. Wingo* factors required a showing of prejudice in a case of post-trial delay. The court recognized that most of the interests invoked by the Sixth Amendment's Speedy Trial Clause "diminish or disappear altogether once there has been a conviction" because the trial has concluded and the convicted no longer enjoys the presumption of innocence. *Perez v. Sullivan*, 793 F.2d 249, 256 (10th Cir. 1986). But "[b]ecause the rights of society proportionately increase, the prejudice claimed by the defendant must be substantial and demonstrable." *Id.*; *see also United States v. Yehling*, 456 F.3d 1236, 1245 (10th Cir. 2006) (affirming that "[p]ost-conviction prejudice 'must be substantial and demonstrable'") (quoting *Perez*).

Several other courts have adopted the Tenth Circuit's reasoning. *See United States v. Nelson-Rodriguez*, 319 F.3d 12, 61 (1st Cir. 2003) (requiring a showing of prejudice in post-trial case and recognizing that in that context "courts have great reluctance to find a speedy trial deprivation where there is no substantial and demonstrable prejudice"); *United States v. Westmoreland*, 712 F.3d 1066, 1077 (7th Cir. 2013) ("Although Westmoreland is able to satisfy some of the factors with respect to his motion for a new trial, he cannot show prejudice—which, because he was convicted, must be 'substantial and demonstrable.'") (quoting *Yehling*, 456 F.3d at 1245); *Burkett v. Cunningham*, 826 F.2d 1208, 1220 (3d Cir. 1987) (noting that it would be the "rarest of circumstances" that a defendant would not have to show prejudice in a post-trial setting); *Hoang v. People*, 323 P.3d 780 (Colo. 2014) (requiring showing of actual prejudice in post-trial challenges under *Barker* because the "appellant no longer receives the presumption of innocence after conviction" and "society's interests in punishment and rehabilitation increase"); *Bodnari v. State*, 839 A.2d 665 (Del. 2003) (requiring a "substantial and demonstrable" showing of prejudice in post-trial *Barker* analysis); *Perdue v. Commonwealth*, 82 S.W.3d 909, 912 (Ky. 2002) ("in a post-conviction situation the showing of prejudice dominates *Barker's* four-part balancing test. ").

The Fifth and the Eleventh Circuits have likewise noted that the dispute over which clause applies is largely academic because, at least as far as post-trial cases are concerned, the Due Process and Speedy Trial tests are essentially the same. *See United States v. Campbell*, 531 F.2d 1333, 1335 (5th Cir. 1976)

("Because the factors to be considered with respect to [the Sixth Amendment and the Due Process Clause] are essentially the same, we will discuss these grounds together."); *United States v. Danner*, 429 Fed. App'x. 915, 917 (11th Cir. 2011) (combining the analysis under the Sixth Amendment and Due Process Clause "because the factors considered are essentially the same"). And in the Second Circuit's decision in *United States v. Ray*, Judge Leval joined the decision even though he disagreed with the conclusion that the Speedy Trial Clause had no application to sentencing, because the "majority's opinion transfers to the Due Process Clause the office that would otherwise be served by the Speedy Trial Clause," making the difference "essentially one of labels." 578 F.3d 184, 190 n.7 (2d Cir. 2009).

This Court should not grant certiorari to engage in an academic exercise. There is no definitive conflict, or really any conflict at all, on the actual substantive question that Betterman poses—whether a defendant is required to show prejudice when asserting a claim of post-trial delay. In short, Betterman's case would come out the same under the Sixth Amendment or the Due Process Clause. This Court should deny the petition on that basis alone.

II. There Is Not a Genuine Conflict on Whether the Speedy Trial Clause Applies to Sentencing Because Courts Have Merely Relied on the Court's Assumption in *Pollard v. United States*.

Nor is there a genuine conflict on whether the Sixth Amendment even applies to sentencing delays. That is because courts that have either adopted or assumed the right to timely sentencing under the Sixth Amendment have done so based solely on this Court's statement in *Pollard v. United States*, which "assume[d] *arguendo* that sentence is part of the trial for purposes of the Sixth Amendment. . " 352 U.S. 354, 361 (1957) (concluding that delay in defendant's sentencing did not violate the Speedy Trial Clause because the delay was not "purposeful or oppressive"); *see also Dickey v. Florida*, 398 U.S. 30, 44 (1970) (Brennan, J., concurring) ("This Court has assumed, *arguendo*, but has not decided, that the interval between judgment and sentencing is governed by the [Speedy Trial Clause].").

The Second Circuit is the only federal court of appeal to undertake "a rigorous examination of whether the Speedy Trial Clause extends to a delay in sentencing." *Ray*, 578 F.3d at 193. After examination of the text, history, and purposes of the Sixth Amendment, the Second Circuit concluded that "it is apparent that sentencing proceedings and trials are separate and distinct phases of criminal prosecutions" and thus the Sixth Amendment did not afford a right to timely sentencing. *Id.* at 198. Like the Montana Supreme Court, the Second Circuit concluded that the right to timely sentencing derived from the Due

Process Clause of the Fifth Amendment, not the Sixth Amendment. *Id.* at 199-200.

None of the federal courts of appeal or state courts of last resort that have held that the Sixth Amendment Speedy Trial right applies to sentencing have engaged in any meaningful analysis. For example, the Fifth Circuit established law of the circuit on the issue for both the Fifth and the Eleventh Circuits, without any actual analysis of the issue whatsoever. *Juarez-Casares v. United States*, 496 F.2d 190, 192 (5th Cir. 1974) (citing *Pollard* as the basis for its holding that the Sixth Amendment applies to sentencing); *United States v. Danner*, 429 Fed. App'x. 915, 917 (11th Cir. 2011) (acknowledging that the Eleventh Circuit is bound by the Fifth Circuit's decision in *Juarez-Casares*).

The Third, Sixth, and Tenth Circuits have done the same thing. *Burkett v. Cunningham*, 826 F.2d 1208, 1220 (3d Cir. 1987) (holding that the Sixth Amendment applies without analysis beyond *Pollard*); *United States v. Reese*, 568 F.2d 1246, 1252-53 (6th Cir. 1977) (assuming that the Sixth Amendment applies to sentencing without analysis before rejecting the claim); *United States v. Yehling*, 456 F.3d 1236, 1243 (10th Cir. 2006) (recognizing a Sixth Amendment and Due Process right to timely sentencing without analysis before rejecting the claim).

Nor have the State courts of last resort provided any meaningful reasoning or analysis for recognizing the right to timely sentencing under the Sixth Amendment. *See State ex rel. McLellan v. Cavanaugh*, 498 A.2d 735, 740 (NH 1985) (briefly discussing Sixth Amendment timely sentencing right based on *Pollard* before rejecting the claim); *Noe v. State*, 391 So. 2d 151,

152 (Ala. 1980) (same); *Gonzales v. State*, 582 P.2d 630, 631-33 (Alaska 1978) (finding, based on *Pollard*, that the Sixth Amendment applies to sentencing, but noting that "some of the policy considerations which support the right to a speedy trial are not strictly relevant to sentencing delays"); *Jolly v. State*, 189 S.W.3d 40, 45 (Ark. 2004) (finding the right to timely sentencing under the Sixth Amendment based on *Pollard* with no substantive analysis); *Perdue v. Commonwealth*, 82 S.W.3d 909, 912 (Ky. 2002) (same); *Trotter v. State*, 554 So. 2d 313, 316 (Miss. 1989) (same); *State v. Dean*, 536 A.2d 909, 912 (Vt. 1987) (same); *Commonwealth v. Pounds*, 417 A.2d 597, 626 (Pa. 1980) (assuming the right applied based on *Pollard*); *State v. Banks*, 720 P.2d 1380, 1385 (Utah 1986) (finding Sixth Amendment right to timely sentencing based on *Pollard* and related state cases without substantive analysis).

Even Betterman admits that a majority of circuits have not explicitly held that the Sixth Amendment applies to sentencing, but have instead simply followed *Pollard's* assumption without deciding the issue. *See* Pet. at 11 (citing cases); *see also Ray*, 578 F.3d at 192.

Aside from the Montana Supreme Court in this case and the Second Circuit in *Ray*. it appears that only three other state high courts have given the issue detailed and substantive analysis. Each of those cases held that the Speedy Trial Clause is a poor fit for cases of sentencing delay. *See State v. Drake*, 259 N.W.2d 862, 866 (Iowa 1977) (concluding that the Sixth Amendment does not include a right to timely sentencing after reviewing the plain text of the amendment, judicial interpretation of the word "trial," and the development of criminal procedure statutes,

but that the Due Process Clause does) *overruled on other grounds by State v. Kaster*, 469 N.W.2d 671, 673 (Iowa 1991); *State v. Johnson*, 363 So. 2d 458, 460 (La. 1978) (concluding that the purposes served by the right to speedy trial do not apply to sentencing); *Ball v. Whyte*, 294 S.E.2d 270, 271 (W. Va. 1982) (finding that the right to efficient sentencing is better suited to Due Process rather than the Sixth Amendment).

In short, every court that has undertaken any relatively substantive analysis of whether the Sixth Amendment applies to sentencing has held that it does not. Indeed, the Montana Supreme Court's decision provides a compelling example of how a court that meaningfully analyzes the issue will invariably reach the conclusion that the Sixth Amendment does not apply in this context. In the case below, the Montana Supreme Court reversed its previous holding that simply cited *Pollard* without more. *State v. Mooney*, 137 P.3d 532 (Mont. 2006). But, like other courts, once the Court actually reasoned its way through the issue, it found that the Due Process Clause was a much more appropriate anchor for the right to timely sentencing than the Sixth Amendment. Pet. App. 15a. Moreover, as the Montana Supreme Court noted, Due Process analysis tracks with the Montana statutory provisions requiring prompt sentencing. Pet. App. 16a (citing Mont. Code Ann. §§ 46-18-101(3)(a) ("Sentencing and punishment must be certain, timely, consistent, and understandable."); 46-18-102(3)(a) ("if the verdict or finding is guilty, sentence must be pronounced and judgment rendered within a reasonable time"); 46-18-

115 ("the court shall conduct a sentencing hearing, without unreasonable delay ").[2]

So although there is technically a split on the issue as to whether the Sixth Amendment applies to sentencing delays, it is not a genuine conflict based on differing analysis. And the emerging trend is that courts are giving the issue considered judgment, rather than simply following *Pollard's* assumption lockstep. The better path would be to let this trend develop among the lower courts to see if a conflict truly emerges after courts give the issue reasoned consideration.

III. The Montana Supreme Court Was Correct That the Due Process Clause Is a Better Fit for the Right to Timely Sentencing.

Grounding the right to timely sentencing in the Sixth Amendment, rather than the Due Process Clause, unnecessarily puts this Court's precedents into possible conflict by raising concerns about the proper remedy for unjustified delay in sentencing. After this Court decided *Pollard*, it held that "the only possible remedy" for a violation of the right protected by the Speedy Trial Clause is dismissal of the indictment. *Strunk v. United States*, 412 U.S. 434, 440 (1973). As the Montana Supreme Court recognized, this Court has "rejected the 'doctrine that a prisoner, whose guilt is established, by a regular verdict, is to escape punishment altogether, because the court committed an error in passing sentence.'" *Bozza v. United States*,

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[2] Betterman did not raise any statutory claim under these provisions, and therefore he waived them. Pet. App. 17a, n.6.

330 U.S. 160, 166 (1947) (quoting *In re Bonner*, 151 U.S. 242, 260 (1894)). "The Constitution does not require that sentencing should be a game in which a wrong move by the judge means immunity for the prisoner." *Bozza*, 330 U.S. at 166; *see also Pollard*, 352 U.S. at 362 ("Error in the course of a prosecution resulting in a conviction calls for correction of the error, not the release of the accused.").

Thus, to the extent that *Strunk* supports outright dismissal of the charges, the remedy is in serious tension with the principles expressed in *Bozza*. But *Strunk* and *Bozza* "are not in tension so long as the Speedy Trial Clause is not read to extend to sentencing proceedings." *Ray*, 578 F.3d at 194.

The Montana Supreme Court was also correct that the Sixth Amendment's reference to a "speedy. . . trial" right supports protecting the defendant's right to a speedy determination of guilt, not a speedy imposition of sentence. Pet. at 8-9. That is consistent with the common understanding that sentencing proceedings and trial are separate and distinct phases. *Id; see Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000) ("After trial and conviction are past, the defendant is submitted to 'judgment' by the court—the stage approximating in modern times the imposition of sentence.") (quoting 4 W Blackstone, *Commentaries on the Laws of England* 343 (1769)).

Moreover, as the Montana Supreme Court recognized, a "delayed sentencing raises different concerns than those raised by a delay in proceeding to trial." Pet. App. 13a. Specifically, the concerns of prejudice that support the speedy-trial guarantee—"including oppressive pretrial incarceration, anxiety

and concern of the accused, and the possibility that the [accused's] defense will be impaired by dimming memories and loss of exculpatory evidence," *Doggett v. United States*, 505 U.S. 647, 654 (1992)—are of less concern in sentencing delays since "we are no longer considering an accused, but someone who has been convicted of a crime." Pet. App. 12a-13a. That is especially so given the relaxed procedures and lower burdens of proof involved in sentencing. *See Nichols v. United States*, 511 U.S. 738, 747 (1994) ("sentencing process" is "less exacting than the process of establishing guilt"); *McMillan v. Pennsylvania*, 477 U.S. 79, 91 (1986) ("Sentencing courts have traditionally heard evidence and found facts without any prescribed burden of proof at all.").

But this of course does not mean that the Petitioner is left without a claim, as noted above. Just as the Due Process Clause protects against "oppressive delay" before the speedy-trial right attaches, *see United States v. Lovasco*, 431 U.S. 783, 789 (1977), so does it protect against unreasonable delay after trial is completed. Pet. App. 15a-16a. In other words, the Due Process Clause bookends the rights of the accused before trial and the rights of the convicted after trial. The Speedy Trial Clause, on the other hand, should be limited to just that—trial.

And besides, anchoring the right to timely sentencing in the Sixth Amendment does not give defendants the predictability that Betterman claims it would. *See* Pet. at 19. Although the tests apply similarly, the Due Process test is, if anything, more straightforward. The "right to a speedy trial is a more vague concept than other procedural rights," *Barker*,

407 U.S. at 521, that requires a "difficult and sensitive balancing process." *Id.* at 533. Courts must therefore "approach speedy trial cases on an *ad hoc* basis." *Id.* at 530. Thus, the result is inevitably unpredictable. The two-part *Lovasco* Due Process test, on the other hand, is more straightforward and easier to apply. 431 U.S. 783, 790 (assessing only "[1] the reasons for the delay as well as [2] the prejudice to the accused."). So if it is predictability that Betterman wants, the Speedy Trial Clause is not the answer.

CONCLUSION

For the foregoing reasons, Montana asks that this Court deny Betterman's petition for certiorari.

Respectfully submitted,

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